LIBRARY
SUPREME COURT, U. S.

FILED
JUL 22 197
MICHAEL RODAK, JR.,

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1954

ALPHA DISTRIBUTING COMPANY OF CALIFORNIA, INC., etc.,

Petitioner,

vs.

JACK DANIEL DISTILLERY, LEM MOTLOW PROP., INC. a corporation; BROWN-FORMAN DISTILLERS CORPORATION,

Respondents

Respondents' Brief in Opposition to Petition for Certiorari

ARTHUR B. DUNNE
LOUIS L. PHELPS
601 California Street
San Francisco, California 94108
Attorneys for Respondents

SORG PRINTING COMPANY OF CALIFORNIA, 348 FIRST STREET, SAN FRANCISCO 94105

INDEX

	Page
Preliminary Statement	1
No Ground for Certiorari Is Shown	9

TABLE OF AUTHORITIES CITED

CASES	Pages
Alpha Distributing Co. of Cal., Inc. v. Jack Daniel Distillery, 454 F2d 442 (Cir. 9)	3, 4
Burgermeister Brewing v. Bowman, 227 CA2d 274, 38 Cal Rptr 597	9
Chicago Title Ins. Co. v. Great Western Financial Corp., 69 C2d 305, 70 Cal Rptr 849, 444 P2d 481	3, 9
Herron v. State Farm Mutual Ins. Co., 56 C2d 202, 14 Cal Rptr 294, 363 P2d 310	3, 9
Imperial Ice Co. v. Rossier, 18 C2d 33, 112 P2d 631	3, 9
International Aerial Tramway Corp. v. Konrad Doppelmayer & Sohn, 70 C2d 400, 74 Cal Rptr 908, 450 P2d 284	3, 9
Jos. E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F2d 71 (Cir. 9)	4
Mangini v. Wolfschmidt, Ltd., 192 CA2d 64, 13 Cal Rptr 503	9

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1954

ALPHA DISTRIBUTING COMPANY OF CALIFORNIA, INC., etc.,

Petitioner,

vs.

JACK DANIEL DISTILLERY, LEM MOTLOW PROP., INC. a corporation; BROWN-FORMAN DISTILLERS CORPORATION,

Respondents

Respondents' Brief in Opposition to Petition for Certiorari

Opposing the petition for certiorari Respondents respectfully show:

PRELIMINARY STATEMENT

The Petitioner's statement of this case requires correction and amplification.

Respondent Jack Daniel is a whiskey distiller and a wholly owned subsidiary of respondent Brown-Forman. In 1960 it was

distributing, through petitioner Alpha as its exclusive distributor, its whiskey in a part of California centered at San Francisco Bay. At that time Alpha was also the distributor for competing Schenley products.

On a determination that it was in its interest to change its distributor Jack Daniel, in the latter part of 1960, gave Alpha written notice of termination of the distributorship effective December 31, 1960 (and in fact so terminated it and changed its distributor). Thereupon Alpha, in December 1960, in a California court, sued respondents claiming (1) that the termination was in breach of an oral contract that Alpha should have the distributorship so long as it properly performed and that the distributorship was terminable only for cause, (2) that the termination was a tortious interference with an advantageous business relationship and (3) that the termination was in violation of antitrust statutes. On removal to the Federal court Alpha added a fourth count that stated no new facts but asserted the conclusion that the antitrust violation was of the Sherman Act.

The District Court, upon rather full findings of the relationship of the parties, found (1) that the agreement between Alpha and Jack Daniel was for a distributorship so long as Alpha performed and was terminable only for cause, that Jack Daniel terminated in violation of that contract and was liable in damages in an amount awarded, (2) that there had been no tortious interference with any business relation and (3) on only a further general finding held that there had been no antitrust violation.

The Court of Appeals reversed the holding of the District Court of breach of contract. It did not "independently resolve factual issues" (as the petition incorrectly states) but to the contrary held that there was *no* evidence of an agreement for *any* term (indefinite or otherwise) or that the distributorship was terminable only for cause, that the finding to that effect was "clearly erroneous", that under *International Aerial Tramway*

Corp. v. Konrad Doppelmayer & Sohn, 70 C2d 400, 74 Cal Rptr 908, 450 P2d 284 the term of the contract was for not more than "a reasonable time", "terminable at will by any party upon reasonable notice after such a reasonable time", that the notice of termination was reasonable and was given after the contract had been in effect a reasonable time. Accordingly, under state law, there had been no breach of contract. (454 F2d 442, 448-449) It affirmed the holding of no tortious interference with business relationship on the authority of *Imperial Ice Co. v. Rossier*, 18 C2d 33, 112 P2d 631, *Herron v. State Farm Mutual Ins. Co.*, 56 C2d 202, 14 Cal Rptr 294, 363 P2d 310 and *Chicago Title Ins. Co. v. Great Western Financial Corp.*, 69 C2d 305, 70 Cal Rptr 849, 444 P2d 481. (454 F2d at 449-451) But on the antitrust issue it held that the general finding was insufficient and remanded the cause to the District Court for further findings on this issue.

More precisely on the antitrust issue the Court of Appeals, speaking in terms of this case, held (454 F2d 442, 452ff):

> "The substance of Alpha's antitrust position, *insofar as it has possible merit*, is that defendants combining and conspiring with each other, and others, and with a purpose to *hamper competition by Schenley products* by switching the Jack Daniel distributorship from Alpha to Rathjen, damaged Alpha in its business and property by causing the destruction of:
>
> 1. its contracts rights;
> 2. its right to purchase its requirements of Jack Daniel's products in the usual course (with, or without, a contract); and
> 3. its good will (a) as related to the general subjet matter and (b) as related to its allocated customers—'both of the latter as appropriated to defendants and Rathjen.'
>
> To a substantial extent, Alpha's antitrust claims are thus *essentially a reassertion of Alpha's claims based upon the asserted breach of the Alpha-Jack Daniel distributorship contract, and upon the defendants' asserted tortious interference*

with business relations between Alpha and Jack Daniel. As determined above, however, the contract and tortious interference claims are without merit. *Apart from those two elements,* the antitrust claims at issue here are essentially grounded upon *Jack Daniel's 'refusual to deal' with Alpha* after December 31, 1960.

It is not a *per se* violation of the antitrust laws for a manufacturer or supplier to agree with a distributor to give him an exclusive franchise, *even if this means cutting off another distributor.* Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 76 (9th Cir. 1969) *and cases there cited.* (Court's italics) Moreover, without more, it is not a *per se* violation for the manufacturer or supplier *to combine or conspire* with others to make a change in its exclusive franchises, *cutting off the supply of a former distributor. Hawaiian Oke, supra,* at 76. Thus, in this case, the fact that Jack Daniel, with or without the encouragement of Brown-Forman, determined to change its exclusive distributorship from Alpha to Rathjen *and the farther contention* that Jack Daniel, Brown-Forman, Rathjen, and others combined to make that decision have, standing alone, no antitrust significance.

"The critical inquiry in such 'refusal to deal' cases is not whether there was a refusal to deal, or whether a refusal to deal was carried out by agreement with others, but rather whether the refusal to deal, manifested by a combination or conspiracy, is so anticompetitive, in purpose or effect, or both, *as to be an unreasonable restraint of trade. Hawaiian Oke, supra,* at 77-78; Walker Distributing Co. v. Lucky Lager Brewing Co., 323 F.2d 1, 7 (9th Cir. 1963). This inquiry is primarily a factual one, and its resolution often requires determination of motive or intent. *Hawaiian Oke* and *Walker* both contain abundant discussion concerning the factual elements to be weighted in resolving the issue as do other cases dealing with the problem. *See, e. g.,* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967); United States v. Parke, Davis & Co., 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505

(1960); Beverage Distributors, Inc. v. Olympia Brewing Co., 440 F.2d 21 (9th Cir. 1971); Scanlan v. Anheuser-Busch, Inc., 388 F.2d 918 (9th Cir. 1968).

In the present case, the *facts* concerning the possible anti-competitive *purpose or effect* of the change in Jack Daniel's distributorship were very much *in issue*. The controvery pertained primarily to the *possible effort* of defendants and others to *hamper competition by Schenley products* which were also distributed by Alpha. (*See* note 14, *infra*.)"

The Court's footnote 14 was deadly specific:

". . . Alpha contends the *action was taken*, at least in part, in *anticipatory retaliation against the Schenley distilleries*, whose products Alpha carried, thus implying an anticompetitive motive. Jack Daniel and Brown-Forman, on the other hand, contend that Jack Daniel terminated *because of Alpha's financial position vis-a-vis Schenley, as a matter of sound business judgment*. The *findings make no reference* to the issue, *which we think critical* in determining whether Jack Daniel's termination was anticompetitive in purpose or effect."

The ultimate conclusion was (454 F2d 453, col 2):

"We therefore conclude that supplemental findings of fact and appropriate conclusions of law must be entered with respect to the antitrust claims. Nothing in this opinion is intended to suggest what those findings and conclusions should be."

On remand the District Court, quite contrary to the inaccurate statement of the petition (p. 5) that the only supplemental findings were that respondents had refused "to further deal with Alpha, upon 'the conclusion that this course was in the best financial interest of Jack Daniel' and of Brown-Forman" made extensive findings directed to the matters which the Court of Appeals found had been left uncertain and to what that court had held was the "critical inquiry". The District Court found:

"13. Neither defendant Jack Daniel nor defendant Brown-Forman was a party to any contract or combination or conspiracy in restraint of trade or commerce or otherwise, nor did either of them, by any act or omission, restrain trade or commerce, nor did either of them monopolize or attempt to monopolize or combine or conspire with any other person or persons, to monopolize *any part of trade or commerce. The termination, by defendant Jack Daniel, of plaintiff Alpha as a distributor for defendant Jack Daniel and the replacement of plaintiff Alpha by Rathjen as a distributor of Jack Daniel whiskey was not a restrain of trade or commerce, unreasonable or otherwise, and in no way lessened* competition or tended to create a monopoly. Plaintiff Alpha was in no way injured or damaged or affected in its business or property by reason of anything forbidden in the antitrust laws of the United States." (Cl. Tr. 2772: 21-30.)

The Supplemental Findings further found:

In 1954-1956 "in conjunction with Schenley * * * the Alpha distributing enterprise was reorganized as to its corporate structure, its operations and its finances."[1] (Cl. Tr. 2766:17-20) The Findings then go on:

"The result of the Alpha reorganization was that after June 30, 1957 *Alpha was under the domination of Schenley* through its financial obligations to Schenley and the fact that Schenley was its principal supplier. *Alpha's continued existence as a distributing operation was dependent upon, Schenley.* Except for the extension of credit which Schenley gave to Alpha, Alpha could not have operated without loans to it and in 1960 its financial situation was such that it could not have obtained a bank loan for this purpose. Alpha's operation after 1956 was such that had it been necessary to resort to bank borrowing in substitution for the interest free credit extended to it by Schenley the interest charge to service such borrowing would have made it impossible for Alpha to operate at a profit. After June 30, 1958 Alpha did no bank financing.

---

1. The details are given (Cl. Tr. 2766:20-2768:7—see further Cl. Tr. 2728-2737).

> Alpha advised its suppliers, Parrott & Co. and Jack Daniel included, of the nature of its reorganization and that it was being financed by the extension of credit by Schenley. This, and the fact that the extension of credit by Schenley to Alpha was in a very large amount, was known to Jack Daniel in the latter half of 1960. It was discussed by Alpha's president, di Grazia, with Brown-Forman's Robinson S. Brown, Jr., when they met in San Francisco in October, 1958 (see par. 1, above) and di Grazia said that Schenley 'caused him a lot of frustration', 'that his company was in great debt to Schenley', and he 'did express concern'; he said 'that he was not happy being under the domination of Schenley.' "

Meanwhile a survey of the Rathjen operation showed that it had much improved. (Cl. Tr. 2769)

In October 1960 Jack Daniel considered in detail its situation in the territory served by Alpha and "concluded as a matter of sound business judgment" that *it "would be better served by Rathjen as a distributor than by Alpha* and that Alpha should be terminated." Accordingly the distributorship was transferred. (Cl. Tr. 2770 ¶ 9)

In its notice of termination the reason given was the desire to consolidate with one organization. (Cl. Tr. 2771) The court found the termination was *"solely* for the purpose * * * of obtaining a distributor who would be better for distribution of Jack Daniel whiskey" and neither respondent "acted to *hamper or restrain or affect trade in the product of anyone else",* no conduct "was in retaliation against Schenley, anticipatory or otherwise" and there was no "purpose, motive or intent except to make Jack Daniel products more viable as competitive products in an open competitive market." The finding in full is:

> "Jack Daniel never expressed to Alpha or to anyone else any other reason, or cause or purpose for said termination of Alpha's distributorship or change of distributor, *it had no other reason or purpose or cause or motive or interest* and it did so *solely for the purpose and for the hoped-for effect*

of obtaining a distributor who would be better for the distribution of Jack Daniel whiskey in free competition in an open and competitive market. Brown-Forman had no other reason or cause or purpose or motive or interest for acting to have Jack Daniel so act. Both Brown-Forman and Jack Daniel acted *solely* for their own legitimate business interests and *neither acted to hamper or restrain or affect trade in the product of anyone else or to cause, or to urge upon, anyone else to do so, or to cause or induce any course of action upon the part of Alpha or Schenley,* excepting only by a course of free and open competition in an unrestrained and competitive market. *No conduct of defendants had any effect on distribution of any product other than products manufactured by them,* except for the effect of competition in open and competitive markets, or was in retaliation against Schenley, anticipatory or otherwise. Neither of the defendants had any anticompetitive motive or intent for terminating Alpha *or any purpose, motive or interest to impose or induce any anticompetitive practice or conduct on the part of Alpha or to cause Alpha to conform its conduct to any anticompetitive objective* or to injure or damage plaintiff Alpha or put it out of business or to force it to comply with any demand, *or any purpose, motive or intent except to make Jack Daniel products more viable as competitive products in an open competitive market.* Defendants' conduct in respect of terminating Alpha as distributor for Jack Daniel was *based solely* on their judgments that Rathjen would serve Jack Daniel better as a distributor than would Alpha and was *solely for the purpose of obtaining such better distribution* and their only purpose, motive and intent was to change the distributor for Jack Daniel. * * * The termination of Alpha by Jack Daniel had no effect upon any Schenley product or to hamper or affect competition of any other product." (Cl. Tr. 2771, 2772)

It is obvious that neither Brown-Forman nor Jack Daniel could themselves directly affect Schenley or Schenley product except by competition. The only other way, in the circumstances of this case,

that they could affect Schenley could be through inducing some action by Alpha. They could do this only by communication of some sort with Alpha to this end. It is distinctly found that there was none.

On appeal from the resulting judgment for defendants the Court of Appeals held that the Supplemental Findings satisfied its directions on remand.

NO GROUND FOR CERTIORARI IS SHOWN

The petition promises to develop grounds which will satisfy Rule 19 of this Court. It never does so. As grounds the petition says "that the Court of Appeals has rendered a decision (i) deciding important questions in a way in conflict with applicable state law, (ii) deciding questions in conflict with other Courts of Appeals on the same matters, (iii) deciding federal questions in a way in conflict with decisions of the Court and (iv) so far departing from the accepted and usual course of proceedings and so far sanctioning such a departure by the District Court as to call for an exercise of the Court's power of supervision."

As to state law: The holding on the Contract Claim was that there was *no* evidence of an agreement for any term and that consequently the agreement was for only a reasonable time which had expired. There is no conflict of state decisions on this point. But if there is the cases relied on by petitioner, *Mangini,* 192 CA2d 74 and *Bowman,* 227 CA2d 274, earlier decisions of intermediate courts of appeal, must give way to the later Supreme Court holding in the *International Aerial Tramway* case relied on by the Court of Appeals. The Court of Appeals' quotation from it shows that it was applicable and controling. On the issue of tortious interference there is no serious attempt to show that the Court of Appeals misread the *Imperial Ice, Herron* and *Chicago Title Insurance* cases or misapplied them and erred in affirming the District Court.

There is no attempt whatsoever to show any conflict with any other Court of Appeals.

There is no decision of this Court that a "refusal to deal",—termination of a distributorship for solely good business reasons and not as a sanction for some improper antitrust purpose, such as price fixing,—is not entirely proper.

It is no departure from the accepted and usual course of proceedings to remand a case for further findings when the findings are insufficient because general only.

There is no real claim that the evidence does not support the Supplemental Findings or that the Supplemental Findings do not support the judgment.

It is respectfully submitted that the petition should be denied.

San Francisco, California, July 17, 1974.

ARTHUR B. DUNNE
LOUIS L. PHELPS
Attorneys for Respondents